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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91185325
Party	Defendant Olympic Mountain and Marine Products, Inc.
Correspondence Address	Philip A. Kantor Law Offices of Philip A. Kantor, P.C. 1781 Village Center Circle, Suite 120 Las Vegas, NV 89134 UNITED STATES prsak@aya.yale.edu
Submission	Motion to Extend
Filer's Name	Philip A. Kantor
Filer's e-mail	prsak@aya.yale.edu
Signature	/Philip A. Kantor/
Date	03/21/2010
Attachments	Memorandum in Opposition to Motion to Extend.pdf (9 pages)(305393 bytes) PAK Declaration in Opposition to Motion to Extend.pdf (32 pages)(1346170 bytes) Declaration of Jeff Stice in Opposition to Motion to Extend.pdf (3 pages)(103495 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

LA SENZA CORP.,	:	
Opposer,	:	Opposition No. 91185325
v.	:	
OLYMPIC MOUNTAIN AND MARINE PRODUCTS, INC.,	:	
Applicant.	:	

**MEMORANDUM IN OPPOSITION TO OPPOSER'S
MOTION TO EXTEND DEADLINE TO RESPOND**

Introduction and Background

The underlying motion is Applicant's Motion for Leave to Amend Answer and Assert Counterclaim for Partial Cancellation ("Motion for Leave to Amend") dated November 20, 2009. Declaration of Philip A. Kantor in Opposition to Opposer's Motion to Extend Deadline to Respond, dated March 21, 2010 ("Kantor Dec."), ¶ 2. Answering papers on the Motion for Leave to Amend were originally due on December 10, 2009. *Id.* On December 10, 2009, Opposer's counsel phoned Applicant's counsel with the proposal summarized in his 2:22pm email to Applicant's counsel (Kantor Dec., Ex. 1) as follows:

Dear Phil:

As discussed this afternoon, we propose that Applicant withdraw the pending Motion to amend and Opposer file, with Applicant's consent, a Motion to amend the LA SENZA registration (limiting the identification of goods to "body lotions"). As you requested, we will prepare a proposed filing for your review and consideration.

So that the parties have sufficient time to discuss this proposal, it was agreed to extend Opposer's deadline to

respond to the above Motion by one week to December 17, 2009, and we will file that with the Board.

Sincerely,

Matthew J. Cuccias, Esquire

Opposer's deadline to answer the Motion for Leave to Amend was duly extended to December 17, 2009. Kantor Dec., ¶ 3. On December 14, 2009, Opposer's counsel sent Applicant's counsel the promised papers, but Applicant was unwilling to approve them. *Id.* Applicant's reason for withholding approval was set forth in a December 15, 2009 email (Kantor Dec., Ex. 1). In brief, Opposer's papers provided for withdrawal of the entire Motion for Leave to Amend, whereas so much of the motion as sought leave to assert the affirmative defense of unclean hands was not directly relevant to Opposer's offer to partially cancel its LA SENZA registration. *Id.*

In response to Applicant's disapproval, Opposer sought more time to consider what to do (Kantor Dec., Ex. 2). An additional week was given, extending Opposer's deadline to December 24, 2009, though more time was offered if actually needed. Kantor Dec., ¶ 4. During this time, the parties resolved to try settling the case generally, and the deadline to answer was extended to January 7, 2010. *Id.* This was then extended by a month to February 7, 2010, with Applicant's understanding that all transactions needed to consummate settlement of the entire case would occur before then. *Id.*

On January 14, 2010, Applicant tendered a detailed settlement proposal to Opposer's counsel (Kantor Dec., Ex. 3).

On February 5, 2010 (the deadline had been extended to February 7), opposing counsel wrote (Kantor Dec., Ex. 4):

Dear Philip:

We had hoped to provide a response to your client's settlement proposal by this time. However, we are not now in such a position.

To allow for the prospect of an amicable resolution of this matter, we seek your consent to a thirty (30) day extension of time and service by email.

In view of the schedule (and the current snow storm in D.C.), we would appreciate receiving your consent today.

Thank you.

Sincerely,

Matthew J. Cuccias, Esquire

Applicant agreed to the entire thirty-day extension requested by Opposer, "but on the informal condition that La Senza get back to us on settlement within two weeks, so that there is a meaningful chance to settle the whole case, after back-and-forth, within the thirty days." Kantor Dec., Ex. 4. Interpreting the "informal condition" referred to as meaning "best efforts," Opposer proceeded, and the deadline was extended to March 14, 2010. Kantor Dec., ¶ 7.

On March 1, 2010, Applicant's counsel wrote to opposing counsel expressing his concern that the time was elapsing without any response from Opposer (Kantor Dec., Ex. 5):

Dear Matthew:

I'm afraid we won't have time to complete a deal if we don't hear back from you. Now is about the time you were supposed to get back to us. Please do so. Thank you.

As ever,

Phil Kantor

The foregoing email was postmarked with a U.S. Postal Service Electronic Postmark (Kantor Dec., Ex. 5).

On March 9, 2010, Opposer sent terms of settlement (Kantor Dec., Ex. 4). They were not styled "counterproposal" and, in Applicant's opinion, were not at all responsive to Applicant's settlement proposal. Kantor Dec., ¶ 9. Indeed, they did not refer to or acknowledge Applicant's settlement proposal at all, despite the effort Applicant had put into its settlement proposal and the two months Opposer had to consider it. Applicant's counsel wrote just this to Opposer's counsel on March 12, 2010 (Kantor Dec., Ex. 4).

The same day, March 12, 2010, Opposer's counsel wrote seeking to extend Opposer's time to answer the Motion for Leave to Amend (Kantor Dec., Ex. 4):

Dear Philip:

In view of your below email (which I found surprising), it may be useful to chat about the various proposals; and suggest we do so early next week (presently, I am out of the office).

In the meantime, we request an extension of the pending deadline.

Sincerely,

Matthew J. Cuccias, Esquire

The same day, March 12, 2010, after conferring with Applicant, Applicant's counsel wrote back (Kantor Dec., Ex. 4):

Dear Matthew:

I am always willing to talk. I can't give a further extension, unfortunately, as the client doesn't want to do it, and my authority to do so is now limited. This is why I so

much wanted to get an earlier response from you, so that we could still have some back and forth within the long extension last time. Anyway, I see no problem having a dialogue while the Board decides the pending motion, so you are certainly free to call. I will be with a client from England all day Monday.

As ever,

Philip

On March 15, 2010, Opposer made its unilateral Motion to Extend.

**THE MOTION TO EXTEND IS
UNREASONABLE IN THE CIRCUMSTANCES**

The record shows that Applicant has readily granted courtesy extensions to Opposer, and has evinced a clear willingness to settle this case. The Motion to Extend, however, suggests that Applicant's conduct has been unreasonable and harsh. For this reason alone, Applicant feels compelled to trouble the Board with its opposition to the motion.

Opposer asserts¹ that "[o]n March 12, 2010 — the last business day prior to Opposer's filing deadline — Applicant's counsel sent an email rejecting Opposer's settlement counter-proposal" (Motion to Extend, p. 1). This assertion makes it appear that Applicant sought an unfair advantage. In fact, however, Applicant's extensive written settlement initiative of January 14 was not "acknowledged" until March 9. Applicant's counsel was ethically required to present the "counterproposal" to his client, which took a couple of days (Applicant's principal travels extensively to trade shows and sales presentations), and on March 12, a response was provided. In short, Opposer

¹ Opposer has submitted no affidavit or declaration in support of the Motion to Extend.

mulled Applicant's proposal for two months; Applicant mulled Opposer's proposal for three days. Applicant consequently rejects the label of unreasonable and harsh.

Page 2 of the Motion to Extend suggests that Applicant unreasonably terminated settlement discussion: "As noted above, Opposer deferred finalizing and filing a response to Applicant's Motion while the parties had been engaged in discussions — the result of which may have been to obviate the need for its filing. Now that such discussions appear to be concluded, Opposer will submit its response to Applicant's Motion."

What happened, however, is that even after Applicant rejected Opposer's settlement terms, Opposer's counsel wrote that "it may be useful to chat about the various proposals ... [i]n the meantime, we request an extension of the pending deadline." Kantor Dec., Ex. 4. To this, Applicant's counsel replied that Applicant would not authorize an extension of time in the circumstances, but that "I am always willing to talk ... I see no problem having a dialogue while the Board decides the pending motion" *Id.* From the foregoing, one cannot help but conclude that Opposer was willing to discuss settlement so long as Applicant would continue to defer the proceedings, but once such willingness was withdrawn, "discussions appear to be concluded."

In sum, Opposer has given every indication that it wants neither to support this opposition nor negotiate its resolution in good faith. Rather, Opposer has been solely responsible for any prejudice it would suffer by the denial of the Motion to Extend, and appears to want no more from this proceeding than to keep Applicant in limbo as Opposer enjoys the benefits of the *status quo*.

Opposer justifies the Motion to Extend by referring to the parties' ongoing settlement discussions. However, the record shows it was not reasonable for Opposer to rely on Applicant providing a further extension after this last one, given the stated conditions of the last extension, and the fact that major points remained to be resolved — indeed, Applicant did not even deem Opposer's settlement terms to be responsive or mutual. In the circumstances, Applicant clearly could not depend on settlement as the most expeditious track to resolution of this proceeding, but must continue to press its defense.

The Board has repeatedly held that the parties' ongoing settlement discussions, without more, are not grounds upon which to extend applicable deadlines, for example, the taking of testimony:

[E]ven if the parties had been discussing settlement, the mere existence of such negotiations or proposals, without more, would not justify petitioner's delay in proceeding with testimony. In short, no circumstances have been set forth to show any expectation that proceedings would not move forward during any negotiations.

Fairline Boats plc v. New Howmar Boats Corp., 59 USPQ2d 1479, 1480 (TTAB 2000) (citing Instruments SA, v. ASI Instruments, Inc., 53 USPQ2d 1925 (TTAB 1999)).

Although the Board generally supports efforts to settle disputes, it will not require an unwilling party to negotiate a settlement at the expense of its rights to proceed to trial under the statute and applicable rules. Thus, the Board will usually grant reasonable consented motions to extend or suspend, so long as the privilege is not abused. But either party is entitled to insist on proceeding with the case, even if they do so while also negotiating for a settlement. Indeed, without the prospect of trial dates, some parties

— including many plaintiffs in oppositions — have little incentive to negotiate in the first place, since the *status quo* favors their position.

Furthermore, the Motion to Extend would not have been necessary but for Opposer's own lack of diligence. Opposer's lack of diligence is further illustrated by its waiting until the last *extended* day (the last day was on a Sunday; the Motion to Extend was made on the following Monday) to seek an extension. Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848, 1851 (TTAB 2000).

Finally, Applicant is being prejudiced by the delay in resolving this proceeding. *See*, generally, the Declaration of Jeff Stice in Opposition to Opposer's Motion to Extend Deadline to Respond, dated March 21, 2010.

Conclusion

For all of the foregoing reasons, Applicant respectfully prays that the Motion to Extend be denied; and for such other and further relief as may be proper.

Respectfully submitted,



Philip A. Kantor

Law Offices of Philip A. Kantor, P.C.
Suite 120, 1781 Village Center Circle
Las Vegas, NV 89134
Tel.: (702) 255-1300
Fax: (702) 256-6331
prsak@aya.yale.edu

Attorneys for Applicant

Dated: March 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of March, 2010, a true copy of Applicant's Memorandum in Opposition to Opposer's Motion to Extend Deadline to Respond, dated March 21, 2010, together with the Declaration of Philip A. Kantor in Opposition to Opposer's Motion to Extend Deadline to Respond, dated March 21, 2010 and the Declaration of Jeff Stice in Opposition to Opposer's Motion to Extend Deadline to Respond, were served by first-class mail, postage prepaid, upon counsel for Opposer at the address shown below:

JACOBSON HOLMAN PLLC
Attn.: Matthew J. Cuccias, Esq.
400 Seventh Street, N.W.
Washington, D.C. 20004



Rena Millet Kantor

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

LA SENZA CORP.,	:	
Opposer,	:	Opposition No. 91185325
v.	:	
OLYMPIC MOUNTAIN AND MARINE PRODUCTS, INC.,	:	
Applicant.	:	

**DECLARATION OF PHILIP A. KANTOR IN
OPPOSITION TO OPPOSER'S MOTION TO
EXTEND DEADLINE TO RESPOND**

Philip A. Kantor, under penalty of perjury, declares as follows:

1. I am an attorney duly admitted to practice in New York and Nevada. I am counsel of record for Applicant in this proceeding. I submit this Declaration in opposition to Opposer's Motion to Extend Opposer's Deadline to Respond to Applicant's Motion for Leave to Amend (the "Motion to Extend") dated March 15, 2010. I have personal knowledge of the matters described in this Declaration.

2. The underlying motion is Applicant's Motion for Leave to Amend Answer and Assert Counterclaim for Partial Cancellation ("Motion for Leave to Amend") dated November 20, 2009. Answering papers on the Motion for Leave to Amend were originally due on December 10, 2009. On December 10, 2009, Opposer's counsel phoned me with the proposal summarized in his email to me at 2:22pm (*see*, email string annexed in Exhibit 1) as follows:

Dear Phil:

As discussed this afternoon, we propose that Applicant withdraw the pending Motion to amend and Opposer file, with Applicant's consent, a Motion to amend the LA SENZA registration (limiting the identification of goods to "body lotions"). As you requested, we will prepare a proposed filing for your review and consideration.

So that the parties have sufficient time to discuss this proposal, it was agreed to extend Opposer's deadline to respond to the above Motion by one week to December 17, 2009, and we will file that with the Board.

Sincerely,

Matthew J. Cuccias, Esquire

3. Opposer's deadline to answer the Motion for Leave to Amend was duly extended to December 17, 2009. On December 14, 2009, Opposer's counsel sent me the promised papers, but Applicant was unwilling to approve them. Applicant's reason for withholding approval was set forth in a December 15, 2009 email (Exhibit 1). In brief, Opposer's papers provided for withdrawal of the entire Motion for Leave to Amend, whereas so much of the motion as sought leave to assert the affirmative defense of unclean hands was not directly relevant to Opposer's offer to partially cancel its LA SENZA registration.

4. In response to Applicant's disapproval, Opposer sought more time to consider what to do (*see*, email string annexed in Exhibit 2). An additional week was given, extending Opposer's deadline to December 24, 2009, though more time was offered if actually needed. During this time, the parties resolved to try settling the case generally, and the deadline to answer was extended to January 7, 2010. This was then extended by a month to February 7, 2010, with Applicant's understanding that all transactions needed to consummate settlement of the entire case would occur before then.

5. On January 14, 2010, Applicant tendered a detailed settlement proposal to Opposer's counsel (*see*, email and attachment annexed in Exhibit 3).

6. On February 5, 2010 (the deadline had been extended to February 7), opposing counsel wrote (*see*, email string annexed in Exhibit 4):

Dear Philip:

We had hoped to provide a response to your client's settlement proposal by this time. However, we are not now in such a position.

To allow for the prospect of an amicable resolution of this matter, we seek your consent to a thirty (30) day extension of time and service by email.

In view of the schedule (and the current snow storm in D.C.), we would appreciate receiving your consent today.

Thank you.

Sincerely,

Matthew J. Cuccias, Esquire

7. Applicant agreed to the entire thirty-day extension requested by Opposer, "but on the informal condition that La Senza get back to us on settlement within two weeks, so that there is a meaningful chance to settle the whole case, after back-and-forth, within the thirty days" (Exhibit 4). Interpreting the "informal condition" referred to as meaning "best efforts," Opposer proceeded, and the deadline was extended to March 14, 2010.

8. On March 1, 2010, I wrote to opposing counsel expressing my concern that the time was elapsing without any response from Opposer (*see*, email annexed in Exhibit 5):

Dear Matthew:

I'm afraid we won't have time to complete a deal if we don't hear back from you. Now is about the time you were supposed to get back to us. Please do so. Thank you.

As ever,

Phil Kantor

The foregoing email was postmarked with a U.S. Postal Service Electronic Postmark (Exhibit 5).

9. On March 9, 2010, Opposer sent terms of settlement (Exhibit 4). They were not styled "counterproposal" and, in Applicant's opinion, were not at all responsive to Applicant's settlement proposal. Indeed, they did not refer to or acknowledge Applicant's settlement proposal at all, despite the effort Applicant had put into its settlement proposal and the two months Opposer had to consider it. I wrote just this to Opposer's counsel on March 12, 2010 (Exhibit 4).

10. The same day, March 12, 2010, Opposer's counsel wrote seeking to extend Opposer's time to answer the Motion for Leave to Amend (Exhibit 4):

Dear Philip:

In view of your below email (which I found surprising), it may be useful to chat about the various proposals; and suggest we do so early next week (presently, I am out of the office).

In the meantime, we request an extension of the pending deadline.

Sincerely,

Matthew J. Cuccias, Esquire

11. The same day, March 12, 2010, after conferring with my client, I wrote back (Exhibit 4):

Dear Matthew:

I am always willing to talk. I can't give a further extension, unfortunately, as the client doesn't want to do it, and my authority to do so is now limited. This is why I so much wanted to get an earlier response from you, so that we could still have some back and forth within the long extension last time. Anyway, I see no problem having a dialogue while the Board decides the pending motion, so you are certainly free to call. I will be with a client from England all day Monday.

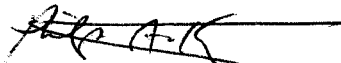
As ever,

Philip

12. On March 15, 2010, Opposer made its unilateral Motion to Extend.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

March 21, 2010

A handwritten signature in black ink, appearing to read "Philip A. Kantor", is written over a horizontal line.

Philip A. Kantor

EXHIBIT 1

Philip A. Kantor

From: Philip A. Kantor [prsak@aya.yale.edu]
Sent: Tuesday, December 15, 2009 12:21 PM
To: 'Matthew Cuccias'
Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Matthew:

I just got off the phone with the client. We are fine with everything except one sentence of the stipulated request:

Conditioned on the acceptance of the above amendment, Applicant hereby withdraws Applicant's Motion for Leave to Amend Answer and Assert Counterclaim for Partial Cancellation, filed on November 20, 2009.

This is because withdrawal of the motion for leave to amend, as provided above, would inadvertently cause withdrawal of the motion for leave to amend to assert the affirmative defense of unclean hands, rather than just for leave to amend to assert a counterclaim for partial cancellation (the issue resolved by La Senza's undertaking to have the TTAB amend the registration). So, we would need to substitute the following sentence:

Conditioned on the acceptance of the above amendment, Applicant hereby withdraws so much of its motion for leave to amend, filed on November 20, 2009, as seeks to assert a counterclaim for partial cancellation, but not for leave to amend to assert the affirmative defense of unclean hands.

Also, the request needs to be styled: "Stipulated Request to Amend Registration and Withdrawal of Motion to Amend to Assert Counterclaim for Partial Cancellation." Alternatively, if you will stipulate to amendment of the answer to assert the affirmative defense, then we can make the withdrawal total.

Do not hesitate to keep the ball rolling by thinking about how we can settle this whole case. Thanks, Matthew.

As ever,

Phil Kantor

From: Matthew Cuccias [mailto:mcuccias@jhip.com]
Sent: Monday, December 14, 2009 8:28 AM
To: 'prsak@aya.yale.edu'
Cc: Matthew Cuccias; George Lewis
Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Phil:

3/19/2010

Please see attached.

We would appreciate receiving your comments by Tuesday (noon, EST) or your consent to a further one week extension of the current deadline.

Thank you.

Sincerely,

Matthew J. Cuccias, Esquire



400 7th Street, NW
Washington, DC 20004
phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

-----Original Message-----

From: Philip A. Kantor [mailto:prsak@aya.yale.edu]

Sent: Thursday, December 10, 2009 5:38 PM

To: Matthew Cuccias

Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Yes, this is what we agreed today. Please try to get me the proposed motion by Monday. Thanks. Phil Kantor

From: Matthew Cuccias [mailto:mcuccias@jhip.com]

Sent: Thursday, December 10, 2009 2:22 PM

To: 'prsak@aya.yale.edu'

Cc: George Lewis; Matthew Cuccias

Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Phil:

As discussed this afternoon, we propose that Applicant withdraw the pending Motion to amend and Opposer file, with Applicant's consent, a Motion to amend the LA SENZA registration (limiting the identification of goods to "body lotions"). As you requested, we will prepare a proposed filing for your review and consideration.

So that the parties have sufficient time to discuss this proposal, it was agreed to extend Opposer's deadline to respond to the above Motion by one week to December 17, 2009, and we will file that with the Board.

Sincerely,

Matthew J. Cuccias, Esquire



400 7th Street, NW
Washington, DC 20004
phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

EXHIBIT 2

Philip A. Kantor

From: Philip A. Kantor [prsak@aya.yale.edu]
Sent: Tuesday, December 15, 2009 4:49 PM
To: 'Matthew Cuccias'
Subject: RE: We are moving (JH Ref. No. I-5837)

Dear Matthew:

Honestly, I would prefer to keep it at a week. Olympic does want to keep the case moving, though not at the expense of regular courtesies or actual inconvenience to anyone. Of course, let me know if more time is actually needed. Thank you, Matthew.

As ever,

Philip

From: Matthew Cuccias [mailto:mcuccias@jhip.com]
Sent: Tuesday, December 15, 2009 3:48 PM
To: 'prsak@aya.yale.edu'
Cc: Matthew Cuccias; George Lewis
Subject: RE: We are moving (JH Ref. No. I-5837)

Dear Phil:

I will be out of the office for a significant portion of tomorrow, and am not confident I will be able to obtain client instructions. Additionally, in view of your moving plans and the Holidays, I would like to accept your offer of consent to an extension, but suggest two weeks. Please advise if this is acceptable.

Good luck with the move.

Sincerely,

Matthew J. Cuccias, Esquire



400 7th Street, NW
Washington, DC 20004
phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

-----Original Message-----

From: Philip A. Kantor [mailto:prsak@aya.yale.edu]
Sent: Tuesday, December 15, 2009 5:47 PM
To: Matthew Cuccias
Subject: We are moving

Dear Matthew:

I should mention to you that we are moving tomorrow to a new address: Suite 120, 1781 Village Center Circle, Las Vegas, NV 89134. Phone, fax and email are unchanged. There will be a period of time tomorrow - and possibly the whole day - when I will have no regular access to phone, fax or email. Obviously, this is if all goes well. If it does not, I could possibly be out of touch even longer. If you are unable to communicate with me and, as a result, feel you need an additional week for discussion or anything else, please consider this email as prior consent to the additional time. *Let's hope the computer and phone people know what they are doing*, and I'll be up and running by tomorrow afternoon.

As ever,

Philip

EXHIBIT 3

Philip A. Kantor

From: Philip A. Kantor [prsak@aya.yale.edu]
Sent: Thursday, January 14, 2010 11:05 AM
To: 'Matthew Cuccias'
Subject: La Senza v. Olympic Mountain
Attachments: Settlement proposal to La Senza.pdf

Dear Matthew:

Hope your year is off to a good start! I look forward to your settlement thoughts in reply.

As ever,

Phil Kantor

3/19/2010

Law Offices of
PHILIP A. KANTOR

Professional Corporation
Suite 120
1781 Village Center Circle
Las Vegas, Nevada 89134

Admitted in Nevada and New York
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Telephone: (702) 255-1300
Telefax: (702) 256-6331

January 14, 2010

Via email: mcuccias@jhip.com

Jacobson Holman PLLC
Attn.: Matthew J. Cuccias, Esq.
400 Seventh Street NW
Washington, DC 20004

Re: *La Senza Corp. v. Olympic Mountain*
TTAB Opp. No. 91185325

Dear Matthew:

I am pleased to provide you with our thoughts on settling the referenced opposition proceeding.

Before turning to a concrete proposal, I would like to review a couple of contextual points that did not figure in the motions to amend and for summary judgment that you have seen. First, unless we are wrong factually, La Senza sells LA SENZA goods as store brand goods at its retail stores and/or on its websites. In other words, no LA SENZA goods are sold through third-party retailers. By contrast, Olympic Mountain has no ESSENZA stores, but sells ESSENZA goods only through third-party retail outlets, such as Costco. Olympic Mountain believes this is a strong point of differentiation tending to diminish confusion between the brands. Since La Senza customers have only experienced seeing LA SENZA merchandise at LA SENZA stores or on its websites, they would tend not to think that ESSENZA merchandise sold at a third-party store, such as Costco, was associated in any way with the LA SENZA brand. If Olympic Mountain operated a chain of ESSENZA stores, then this could arguably be a basis to infer confusion: ESSENZA stores selling ESSENZA goods versus LA SENZA stores selling LA SENZA goods. But this is not the case.

Second, La Senza has recently ramped up a trademark registration campaign. Here is the activity we have seen at the USPTO:

LA SENZA HEART SONG

Serial No. 77/685,487 filed March 6, 2009

Class 3 for personal care products and perfumery products, namely, perfume, eau de parfum, eau de cologne, eau de toilette, body splash, body mist, body scrub, bubble bath, shower gel, body wash, body soap, hand soap, body butter, body cream, body lotion, hand lotion, body powder

Mr. Matthew Cuccias, Esq.

January 14, 2010

Page 2

LA SENZA LOVE AFFAIR

Serial No. 77/685,492 filed March 6, 2009

Class 3 for personal care products and perfumery products, namely, perfume, eau de parfum, eau de cologne, eau de toilette, body splash, body mist, body scrub, bubble bath, shower gel, body wash, body soap, hand soap, body butter, body cream, body lotion, hand lotion, body powder

LA SENZA BODY KISS

Serial No. 77/754,627 filed June 8, 2009

Class 3 for personal care products and perfumery products, namely, perfume, eau de parfum, eau de cologne, eau de toilette, body splash, body mist, body scrub, bubble bath, shower gel, body wash, body soap, hand soap, body butter, body cream, body lotion, hand lotion, body powder; hair shampoo, hair conditioner, hair styling gel and hair styling mousse

LA SENZA BEAUTY

Serial No. 77/754,655 filed June 8, 2009

Class 3 for personal care products and perfumery products, namely, perfume, eau de parfum, eau de cologne, eau de toilette, body splash, body mist, body scrub, bubble bath, shower gel, body wash, body soap, hand soap, body butter, body cream, body lotion, hand lotion, body powder; hair shampoo, hair conditioner, hair styling gel and hair styling mousse; makeup products, namely, eye shadow, eye liner, eye pencils, mascara, lip gloss, lip shine, lip balm, lip stick, lip cream, lip pencils, makeup remover; nail polish, nail enamel, nail lacquer, nail polish remover

LOVE LA SENZA

Serial No. 77/648,660 filed January 13, 2009

Class 4 for brazilian, candles, chemises, chokers, feather jackets, fishnet stockings, love cuffs, opera masks, mirrors, nipple tassels, patent leather arm bands, satin handbags, satin ties, skirts, stay up stockings, stockings with a satin bow, waist cinches and a weekend kit containing warming massage oil, body balm, body candy packet, tea lights, satin eye mask and a game board, merrywidows, slippers, scarves and handbags

LA SENZA HEAVENLY LOVE

Serial No. 77/791,207 filed July 28, 2009

Class 3 for personal care products and perfumery products, namely, perfume, eau de parfum, eau de cologne, eau de toilette, body splash, body mist, body scrub, bubble bath, shower gel, body wash, body soap, hand soap, body butter, body cream, body lotion, hand lotion, body powder; hair shampoo, hair conditioner, hair styling gel and hair styling mousse

LA SEXY LA SENZA WILD

Serial No. 77/754,658 filed June 8, 2009

Class 3 for personal care products and perfumery products, namely, perfume, eau de parfum, eau de cologne, eau de toilette, body splash, body mist, body scrub, bubble bath, shower gel, body wash, body soap, hand soap, body butter, body cream, body lotion, hand lotion, body powder; hair shampoo, hair conditioner, hair styling gel and hair styling mousse

BEYOND CLEAVAGE BY LA SENZA

Serial No. 77/891,713 filed December 11, 2009

Class 25 for brassieres, panties, babydolls, shapewear, foundation garments

I ♥ *Cotton* BY LA SENZA

Serial No. 77/891,715 filed December 11, 2009

Class 25 for bras, panties, lingerie, sleepwear, loungewear

* * *

This recent burst of trademark filing activity indicates a strategic move by La Senza. This strategic move seems to be a return to core positioning, namely, positioning LA SENZA as the Canadian VICTORIA'S SECRET, with a special emphasis on young women. This direction is made apparent through the marks: LA SENZA HEART SONG, LA SENZA LOVE AFFAIR, LA SENZA BODY KISS, LA SENZA BEAUTY, LOVE LA SENZA, LA SENZA HEAVENLY LOVE, LA SEXY LA SENZA WILD, BEYOND CLEAVAGE BY LA SENZA. It is also made apparent through the goods: love cuffs, fishnet stockings, nipple tassels, "babydolls," "shapewear," etc. This seems different from earlier La Senza efforts, which featured marks such as LA SENZA SPA, LA SENZA AQUA, LA SENZA EVEOLUTION.

We also see a move by La Senza into the personal care and cosmetics category. Indeed, it may make a great deal of sense for La Senza to make the most of existing apparel customers, who enjoy LA SENZA stores, by selling them non-apparel merchandise, rather than working much harder to poach new apparel customers from competitors.

What do these observations have to do with settlement? First, I think settlement is fostered by the parties recognizing that whatever they may have initially thought about the likelihood of confusion between their brands at a time when they knew very little about each other's brands, familiarity can assuage those concerns. Discovery and informal research show that La Senza is in the business of providing a total retail experience to predominantly young women seeking sexy, fashion-oriented apparel and, going forward, personal care/cosmetics merchandise. Olympic Mountain is in the business of providing household products to the mass market, none of which could be characterized as sexy or high fashion, but rather quality for value. Combined with the difference in retail channels, I think the parties can take comfort in the fact that after investigation, a settlement will compromise very little — actually nothing — in terms of confusion as a practical matter.

Second, I think La Senza has come late to the game in non-apparel categories. Its new strategy of expansion into personal care and cosmetics may make great sense businesswise, but other than the fraught and slender reed of body lotion, rests on filings made within the past year. It is almost ironic that La Senza has picked a fight with Olympic Mountain, for to the extent confusion exists between the two, different brand names, LA SENZA versus ESSENZA, and the two, different categories of goods, personal care/cosmetics versus household goods, priority predominantly lies with Olympic Mountain, who has been doing large volumes of business in the household goods category for years. It would seem to be more in La Senza's interests to argue that the marks are different, and the two companies can easily co-exist in the marketplace — as they have for years — without confusion. This certainly makes sense in view of La Senza's newfound interest in the personal care/cosmetics category.

My recommendation in the circumstances is that the parties formalize lines of demarcation, so that La Senza may be assured its market positioning will not be encroached by Olympic Mountain. In exchange for La Senza dropping the instant opposition, Olympic Mountain would undertake the following:

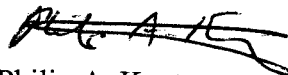
1. No ESSENZA goods shall be positioned to a specifically youth market. This prohibition shall extend to compound trademarks including ESSENZA, taglines used with ESSENZA goods, advertising copy used for ESSENZA goods, and packaging copy and graphics used with ESSENZA goods.
2. No ESSENZA goods shall be positioned as sexy or high-fashion. This prohibition shall extend to use of any of the following terminology as a feature of compound trademarks including ESSENZA, taglines used with ESSENZA goods, advertising copy used for ESSENZA goods, or packaging copy and graphics used with ESSENZA goods: sexy, love affair, heavenly love, wild, body kiss, heart song, cleavage.
3. La Senza counsel shall furnish Olympic Mountain counsel with a schedule of media (publications, radio and television) it uses to advertise its brand to the youth and fashion markets. After review and agreement, Olympic Mountain shall not advertise the ESSENZA brand in any of the agreed media.
4. Olympic Mountain shall not offer retail services under the ESSENZA mark.

I believe the foregoing would prevent any confusion between the LA SENZA and ESSENZA brands. It would also provide the substantial benefits of permitting (a) Olympic Mountain's trademark application to proceed to registration and (b) La Senza to proceed with its expansion into personal care and cosmetics without practical or legal concern over Olympic Mountain's prior activity in household goods categories. Finally, the foregoing can bring an end to the substantial cost on both sides of taking the case forward.

Mr. Matthew Cuccias, Esq.
January 14, 2010
Page 5

Thank you for your consideration. Please reply next week.

Very truly yours,

A handwritten signature in black ink, appearing to read "Philip A. Kantor", with a stylized flourish at the end.

Philip A. Kantor

EXHIBIT 4

Philip A. Kantor

From: Philip A. Kantor [prsak@aya.yale.edu]

Sent: Friday, March 12, 2010 12:09 PM

To: 'Matthew Cuccias'

Cc: 'olympic.trademark@trustifi.com'

Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Matthew: I am always willing to talk. I can't give a further extension, unfortunately, as the client doesn't want to do it, and my authority to do so is now limited. This is why I so much wanted to get an earlier response from you, so that we could still have some back and forth within the long extension last time. Anyway, I see no problem having a dialogue while the Board decides the pending motion, so you are certainly free to call. I will be with a client from England all day Monday.

As ever,

Philip

From: Matthew Cuccias [mailto:mcuccias@jhip.com]

Sent: Friday, March 12, 2010 11:53 AM

To: prsak@aya.yale.edu

Cc: olympic.trademark@trustifi.com; Matthew Cuccias

Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Philip:

In view of your below email (which I found surprising), it may be useful to chat about the various proposals; and suggest we do so early next week (presently, I am out of the office).

In the meantime, we request an extension of the pending deadline.

Sincerely,

Matthew J. Cuccias, Esquire



400 Seventh Street, N.W.
Washington, DC 20004
phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

3/19/2010

From: Philip A. Kantor [prsak@aya.yale.edu]
Sent: Friday, March 12, 2010 12:35 PM
To: Matthew Cuccias
Cc: olympic.trademark@trustifi.com
Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Matthew:

I do not feel the email below was responsive to my long and detailed letter to you regarding settlement. It does not refer in any way to what I wrote, or even acknowledge that I wrote at all. Nevertheless, I forwarded it to my client. The client's take was the same: this does not seem to be a dialogue. Have a good weekend.

As ever,

Philip

From: Matthew Cuccias [mailto:mcuccias@jhip.com]
Sent: Tuesday, March 09, 2010 8:38 AM
To: prsak@aya.yale.edu
Cc: George Lewis; Matthew Cuccias
Subject: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Phil:

Our client is amenable to an amicable resolution on the following general grounds:

- A) Olympic Mountain and Marine Products, Inc. ("Olympic") will agree to not seek to use and/or register any trademark comprising the term "ESSENZA" in connection with ladies' wearing apparel; perfumery products; personal care products; beauty care products; cosmetics; and/or purses, handbags and belts;
- B) Within thirty (30) days of the execution of the agreement, Olympic shall file an amendment to Serial No. 77/572,129 for the ESSENZA mark, by which "purses" will be deleted from the identification of goods in Class 18;
- C) The parties shall file a paper with the Board which will seek the suspension of the opposition proceeding until such time as the above amendment is effected, at which time the Opposition will be withdrawn without prejudice, on Olympic's consent; and
- D) The geographic scope of the agreement is global.

If these terms are agreeable to Olympic, we can prepare a written agreement embodying these and other, standard terms.

We look forward to your response. In the meantime, we suggest a thirty (30) day extension of the current deadline.

Sincerely,

Matthew

Matthew J. Cuccias, Esquire

3/19/2010



400 7th Street, NW
Washington, DC 20004
phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

-----Original Message-----

From: Matthew Cuccias

Sent: Thursday, February 11, 2010 11:25 AM

To: prsak@aya.yale.edu

Cc: George Lewis; Matthew Cuccias

Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Philip:

Thank you for your below email.

I am not sure what you mean by an "informal condition". If you mean that we will use "best efforts", I am comfortable with that. However, I am not comfortable guaranteeing the future actions of my client.

Also, as you may know, we have experienced record snowfalls in the Washington, D.C.-area, resulting in the localized closure of the Federal Government. Thus, I have not been in the office since Friday afternoon. Moreover, while I have email access from home -- it has been intermittent (our email server just came back online).

Accordingly, I propose that the "informal condition" be that we make best efforts to obtain a response in two weeks from now.

Since the government has been closed, the deadline to respond has been extended by operation of the rules. I am hopeful that the government will be open tomorrow, and would like to file the request then.

Sincerely,

Matthew J. Cuccias, Esquire



400 Seventh Street, N.W.
Washington, DC 20004
phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

From: Philip A. Kantor [prsak@aya.yale.edu]
Sent: Monday, February 08, 2010 3:49 PM
To: Matthew Cuccias
Subject: RE: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Matthew:

I just got off the phone with my client. It took a little work, but I persuaded the client to go along with the following plan: Olympic Mountain will consent to an additional thirty days, but on the informal condition that La Senza get back to us on settlement within two weeks, so that there is a meaningful chance to settle the whole case, after back-and-forth, within the thirty days. OK?

Hope you had fun in the snow!

As ever,

Philip

From: Matthew Cuccias [mailto:mcuccias@jhip.com]
Sent: Friday, February 05, 2010 9:06 AM
To: 'prsak@aya.yale.edu'
Cc: Matthew Cuccias; George Lewis
Subject: Opposition No. 91185325 - La Senza Corporation v. Olympic Mountain and Marine Products, Inc. (JH Ref. No. I-5837)

Dear Philip:

We had hoped to provide a response to your client's settlement proposal by this time. However, we are not now in such a position.

To allow for the prospect of an amicable resolution of this matter, we seek your consent to a thirty (30) day extension of time and service by email.

In view of the schedule (and the current snow storm in D.C.), we would appreciate receiving your consent today.

Thank you.

Sincerely,

Matthew J. Cuccias, Esquire



400 7th Street, NW
Washington, DC 20004

3/19/2010

phone: 202-638-6666 x2260
email: mcuccias@jhip.com



Please consider the environment before printing this e-mail.

EXHIBIT 5

From: Philip A. Kantor [prsak@aya.yale.edu]

Sent: Monday, March 01, 2010 5:07 PM

To: 'Matthew Cuccias'

Cc: 'olympic.trademark@trustifi.com'

Subject: Response to settlement offer

Dear Matthew:

I'm afraid we won't have time to complete a deal if we don't hear back from you. Now is about the time you were supposed to get back to us. Please do so. Thank you.

As ever,

Phil Kantor

Philip A. Kantor

From: Trustifi Admin [do_not_reply@trustifi.com]
Sent: Monday, March 01, 2010 5:07 PM
To: Philip Kantor
Subject: USPS Electronic Postmark® - "Philip A. Kantor" <prsak@aya.yale.edu> / Response to settlement offer
Attachments: Response to settlement offer.eml; Response to settlement offer Postmarked.html



THE ATTACHED EMAIL WAS TIME-STAMPED AND SECURED AGAINST T

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- **Mar 01, 2010 6:07:14 PM** - Mountain Time
- **Mar 01, 2010 5:07:14 PM** - Pacific Time
- **Mar 02, 2010 1:07:14 AM** - Universal Coordinated Time

The USPS Postmark Receipt ID is: **10000y99zqk**

The prsak@aya.yale.edu account was debited 1 credit for this transaction.

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Response to settlement offer

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6,698 Bytes

File Fingerprint (SHA256)

8cc1192e 97af0c0d b2e5a86b deb52f16

4df29350 dc9d0003 b02b4491 70a1ecb2

Sender

"Philip A. Kantor" <prsak@aya.yale.edu>

Recipients

"Matthew Cuccias" <mcuccias@jhip.com>

"<olympic.trademark@trustifi.com>

USPS Postmark Tracking Number

10000y99zqk

Postmark Date

Mar 1, 2010 20:07:14 PM (Eastern Standard Time)

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

LA SENZA CORP.,	:	
Opposer,	:	Opposition No. 91185325
v.	:	
OLYMPIC MOUNTAIN AND MARINE PRODUCTS, INC.,	:	
Applicant.	:	

**DECLARATION OF JEFF STICE IN
OPPOSITION TO OPPOSER'S MOTION TO
EXTEND DEADLINE TO RESPOND**

Jeff Stice, under penalty of perjury, declares as follows:

1. I am the principal of Applicant Olympic Mountain and Marine Products, Inc. ("Olympic"). I submit this Declaration in opposition to Opposer's Motion to Extend Opposer's Deadline to Respond to Applicant's Motion for Leave to Amend (the "Motion to Extend") dated March 15, 2010. I have personal knowledge of the matters described in this Declaration.

2. Olympic currently seeks to register the mark ESSENZA for "scented oils used to produce aromas when heated, essential oils for household use" in Class 003; and "scent diffusers comprised of a container and wood rods used to diffuse oil scent poured in the container" in Class 021. This application was filed by Olympic on December 27, 2006 under Lanham Act Section 1(b), but Olympic began making extensive use of the ESSENZA mark for the sale of scent diffusers in interstate

commerce starting on February 6, 2007.¹ Since first introducing its line of ESSENZA scent diffuser products (which include scented oil), Olympic has sold millions of dollars worth of them to the public through large retailers such as Costco Warehouse Clubs.

3. Dealing with the nation's largest retailers has benefits, but also challenges. The buyers we deal with for ESSENZA scent diffuser programs are highly professional and sophisticated. Orders are large and represent substantial commitments on the retailers' part. The buyers are under substantial competitive pressure. For these reasons, the buyers care that our trademarks are registered, and that Olympic be in a position to prevent knockoffs of our products that could compete with the ESSENZA products our retailer customers are selling.

4. As stated above, our ESSENZA scent diffuser programs began in earnest in 2007 pursuant to an intent-to-use trademark application filed in 2006. It is now 2010, yet thanks to this proceeding (our trademark application was otherwise approved by the Trademark Office), we still do not have a registration. This fact is embarrassing and prejudices our standing with our retailer customers, not only for the ESSENZA scent diffuser program, but generally. Moreover, due to the uncertainty of litigation, we feel unable to commit to retailer initiatives to expand the ESSENZA mark to other household products. This latter point entails substantial lost business opportunity for us.

5. For all of the foregoing reasons, Olympic has an incentive to settle this proceeding with Opposer and achieve some business certainty. Olympic has acted on this

¹ In case the Board is unfamiliar with scent diffusers, the product consists of a bottle of scented oil into which the user places wood rods (packaged with the product). The rods wick up the scented oil and diffuse it into the surrounding air.

incentive, seeking to cooperate with Opposer in every way, including the granting of numerous courtesy extensions of time, providing masses of information and documents in response to voluminous discovery requests, and setting forth our settlement thoughts in an extensive written proposal. However, these efforts are not bearing fruit, and it seems Opposer seeks to prolong the *status quo* rather than conclude this proceeding. With the embarrassment and prejudice to our business reaching a critical point, for the reasons explained above, we can no longer continue the *status quo*, but need to pursue settlement and litigation on parallel tracks. Accordingly, I respectfully pray that the Motion to Extend be denied, and for such other and further relief as may be proper.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

March 21, 2010

 3/21/10
Jeff Stice